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ABSTRACT

This brief report states that legal problems with competency testing have been more procedural than substantive-more concerned with implementation than legitimacy. The right to notice is the most straight-forward and firmly established principle to emerge from competency testing litigation. Students must have fair warning and opportunity to prepare for competency tests and/or to prepare for changed graduation requirements. The length of notice should be related to the magnitude of the new requirements. The tests must measure what students have learned, therefore, content validation is legally required. However, controversy remains concerning how to satisfy a content validation requirement. Test impact on special populations must be considered. Competency tests may not reflect racial or cultural bias. And, although special students are not necessarily entitled to regular diplomas, those completing their agreed upon individualized education programs have a right to some certification, such as a special diploma. (PN)

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This Issuegram was prepared on March 1, 1983, by Christiane H. Citron, senior attorney, ECS Law and Education Center. For more detail, call 303-830-3659.

36. Legal Rules for Student Competency Testing

The Issue

States and school districts have turned increasingly to minimum competency testing for diagnosis of education weaknesses and as a graduation requirement. Advocates see these tests as one way to ensure better quality education. But others, educators among them, have continually challenged their educational merits. Even their legality is being questioned by some, including parents and students. Legal problems can arise from how programs are designed and administered. Common concerns revolve around the amount of notice given to students before a testing program is started, its impact on special populations, and the validity of its content. Even though this area of education law is relatively new, a number of important principles have emerged.

Appropriate Use of Competency Tests is Constitutional

The courts have consistently acknowledged that testing is a legitimate educational tool that can aid in the analysis of a child's education needs and progress. One federal appellate court recently declared, a "[s]chool district's desire to ensure the value of its diploma by requiring graduating students to attain minimal skills is admirable, and the

courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights."

Thus, despite popular concern that education is becoming increasingly "legalized," courts continue to follow the norm -- deferring to academic decision making. Over all, the legal problems with competency testing have been more procedural than substantive -- more concerned with implementation than legitimacy. In the most well-known competency testing case, Debra P. v. Turlington, a federal appellate court found that the state's interest in establishing a functional literacy examination was legitimate, if the procedures and test instruments were fair. The state would be allowed to require passage of a fair test as a diploma requirement.

Students Have a Constitutional Right to Adequate Notice of a Testing Program

The right to notice is the most straightforward and firmly established principle to emerge from competency testing litigation. The key to a proper implementation schedule is fair play: students must have fair warning and opportunity to prepare for competency tests. They must have time to prepare for changed graduation requirements. In two cases, courts have ruled that inadequate advance warning of a new testing requirement violated the due process clause of the fourteenth amendment:

- Less than two-school-years' notice of Florida's State Student Assessment Test as a diploma requirement violated due process. (Debra P. v. Turlington)

- A year-and-a-half's notice to handicapped students of Peoria (Ill.) School District's Minimal Competency Test as a diploma requirement violated due process. (Brookhart v. Illinois State Board of Education)

In two other cases notice was held adequate:

- Three-school-years' notice to handicapped students of New York's Basic Competency Test as a diploma requirement satisfied due process. (Board of Education of Northport-East Northport v. Ambach)

- Two-school-years' notice of Tatnall County's (Ga.) achievement test as a diploma requirement satisfied due process. (Anderson v. Banks)

Courts thus far have not defined adequate notice as a specific number of years. They have disagreed about the beginning time point for notice. But, they do seem to agree that less than two years is inadequate notice, and that the length of notice should be related to the magnitude of the new requirement. Handicapped students, generally enrolled in individualized education programs (IEPs), are especially likely to have had inadequate time to prepare for graduation tests. IEPs cannot necessarily "be equated with a course of studies that would prepare them to pass the basic skill tests," according to one court ruling. Another court stressed "the time frame for notice to [handicapped students] is much more crucial than that for non-handicapped students in conventional programs." One way to assure fair warning is for school officials to inform the parents of handicapped children that while placement in an IEP may be best, it may not expose the children to materials upon which minimum competency tests are based. Records of the discussion of, and parental consent to, these critical placement decisions can show that the notice requirement has been met.

Graduation Tests Must Reflect Material Taught

To avoid being arbitrary or capricious, testing must be based on material taught in school. This principle is derived from both the equal protection and due process clauses of the Constitution. Like employment tests, competency tests must be validated for their purposes to be fair. Since the purpose of minimum competency testing is to measure what students have learned, "content validation" is legally required. This aspect of the Debra P. case has caused great controversy, particularly over how to satisfy a content validation requirement.

The confusion over how to validate content arose from Debra P.'s mandate to Florida to show what "was actually taught in the schools of Florida." The state suggested that if material was included in students' curricula, that could be sufficient proof. Plaintiffs contended that curricula items were not necessarily taught in every classroom. While the Debra P. case is still before the court, over proof of content validity, a federal court in Georgia accepted a school district's proof on this issue. The school's expert testimony showed that the tested material was covered in the schools' curriculum. Teacher testimony proved that the curriculum was actually taught. That court acknowledged that: "to require school officials to produce testimony that every teacher finished every lesson and assigned every

problem in the curriculum would impose a paralyzing burden on school authorities and hamper them in constructing an academic program which they believe most effectively meets the needs of their students." Even this court has not really defined content validation.

Competency Tests May Not Reflect Racial Bias

An important corollary to content validity is that tests may not be racially or culturally biased. Before giving tests, school administrators, therefore, must systematically ascertain that every new test instrument is free of bias. Where bias is alleged, courts will scrutinize specific test items.

Perhaps the most troubling aspect of standardized competency testing has been its frequent disparate effect on racial minorities. If a disproportionate number of black children fail a test, a court will examine the circumstances surrounding decisions to require the test for evidence of an intent to discriminate. A disparate impact is determined to be illegal only if there is such evidence. However, the evidence can be inferred from, for instance, historical background and sequence of events leading up to the imposition of the test.

Where there has been an earlier history of purposeful discrimination, such as a dual school system, there is a greater burden on schools to show that a disproportionate racial impact is not the result of previous "educational deprivation" due to past wrongful policies. Schools have to show that "vestiges" of past discrimination do not taint the test. Courts have accordingly delayed testing requirements until the first class that began its schooling after the abolition of a dual school system is ready to be graduated.

The Effect of Competency Tests on Handicapped Students

Neither Section 504 of the Rehabilitation Act of 1973 nor the Education for All Handicapped Children Act (PL 94-142) prohibits requiring that handicapped students meet valid test requirements to receive regular diplomas. The courts have consistently explained that Section 504 does not require schools to lower their academic standards to accommodate properly classified handicapped students who cannot meet those standards because of their handicaps. Such students who cannot pass a test are not "otherwise qualified" to receive a regular diploma; there is no discrimination in denying them a diploma.

Likewise PL 94-142 does not require "specific results," such as a high school diploma, for handicapped children. Its mandate of a "free appropriate public education" is not denied where handicapped children are unable to pass a required test. The statute is meant to assure that handicapped children derive some benefit from education; it does not call for equal results. And most state statutes do not specify whether handicapped students are subject to the usual testing requirements for a diploma.

Nonetheless, schools must try to assure that a handicapped student is fairly tested on his or her actual mastery of material. Some minor modifications may be needed. For instance, a blind student is entitled to be tested in Braille. Likewise, although special students are not necessarily entitled to regular diplomas, those completing their agreed-upon IEPs have a right to some certification, such as a special diploma.

Implications for the States

To conduct minimum competency testing on a sound legal footing, state educators should:

- Give adequate notice of testing
- Validate test content
- Consider test impact on special populations, including racial minorities and the handicapped

States can thus avoid needless and costly litigation. They can meet policy goals on testing without impairing student rights.

Resources

Madaus, George F., The Courts, Validity, and Minimum Competency Testing. Boston: Kluwer-Nijhoff Publishing, 1983.

Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), aff'd, 644 F.2d 397 (5th Cir. 1981), rehearing denied, 654 F.2d 1079 (5th Cir. 1981).

Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981), modified, 540 F. Supp. 761 (S.D. Ga. 1982).

Brookhart v. Illinois State Board of Education, 534 F. Supp. 725 (C.D. Ill. 1982), rev'd, 697 F.2d 179 (7th Cir. 1983).

Board of Education of Northport-East Northport v. Ambach, 107 Misc. 2d 830, 436 N.Y.S.2d 564 (Sup. Ct. 1981), modified, ___ A.D.2d ___ (App. Div. 1982).

Lenfant v. District of Columbia Board of Education, 3 E.H.L.R. 552:272 (D.D.C. 1980).

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